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NOTES ON RECENT MINNESOTA DECISIONS.

The Supreme Court of Minnesota has recently decided certain interesting questions of very general interest, which are worthy of more extended notice than the abstracts of those cases heretofore published in this JOURNAL afford. A brief review of some of these questions is, therefore, believed to be warranted by the importance attaching to them, as well as in consequence of the diversity of opinion prevailing in reference to some of them in the courts of other States.

Eminent Domain. One of the most disputed questions in the law of eminent domain at the present time, is that in reference to the right of the owner of the realty to recover the value of the road bed, rails, ties, etc., placed upon his land by a railroad company acting as a trespasser, without his knowledge or consent, when thereafter proceedings are instituted for the purpose of ascertaining the compensation to be paid to the owner for the right of way across his land. The authorities are now evenly balanced, numerically speaking, upon this subject. In New York, California and Indiana it is held that the owner can recover the value of such improvements,[1] while in Wisconsin and Pennsylvania a contrary doctrine is announced.[2] And now the Supreme court of Minnesota, in the case of *Greve v. First Division St. Paul etc. R. Co.*,[3] reaches a conclusion similar to that announced in Wisconsin and Pennsylvania. This case was reviewed by the present writer in the *American Law Register* for November, 1879, at greater length than the limits of this article will permit, and the conclusion there reached was to the effect that the doctrine thus announced in Pennsylvania and Wisconsin and followed in Minnesota was clearly opposed to well settled legal and equitable principles, as well as to public policy. It is an attempt to do popular equity, natural justice, at the expense of settled legal principles. While it may be a reproach to the law that injustice should be done in any case, it is an infinitely greater reproach that the "inherent uncertainty and difficulty of legal questions should be increased by constant violation of recognized legal principles."

Statutes For Fencing Railroads, It is well settled that at the common law railroad companies are not under obligations to fence their tracks as a protection against cattle straying upon them; the duty to prevent the cattle from thus straying being devolved upon their owner.[4] Now, however, in most of the States, both as a protection to the traveling public and as a protection to the cattle themselves, railroad companies are required by statute to fence their tracks, and are made responsible for cattle killed or injured upon unfenced tracks. Where injuries have occurred upon such tracks the question has arisen whether the remedy is confined to those whose cattle were lawfully on the adjacent land to the exclusion of those whose cattle have strayed upon the adjoining lands passing from thence upon the track. Upon this question the decisions have not been uniform. In some cases it is held that where the cattle were trespassing upon the adjacent land, no recovery can be had, this being upon the theory that their owners have no remedy being themselves in fault for suffering them to stray.[5] In other cases the doctrine is that it is immaterial that the cattle have strayed upon the adjoining land as trespassers, passing thence upon the track.[6] The Supreme Court of Minnesota in *Gillam v. Sioux City etc. R. Co.*,[7] announce a doctrine in consonance with the last named authorities.

Tax Judgments. It must be considered a

[1] Matter of Long Island R. Co., 6 N. Y. (S. C.), 298; United States v. A Tract of land, 47 Cal. 515; Graham v. Connersville etc. R. Co. 36 Ind. 463.

[2] Lyon v. Green Bay etc. R. Co. 42 Wis. 538; Justice v. Nesquehoning Valley R. Co., 87 Pa. St. 28.

[3] 9 Cent. L. J. 17; opinion filed June 12, 1879.

[4] Manchester etc. R. Co. v. Wallis, 14 C. B. 213; s. c, 25 E. L. & Eq. 373; Brown v. Hannibal etc. R. Co. 33 Mo. 309; Tonawanda R. Co. v. Munger, 5 Denio. 255; s. c. 4 N. Y. 349; Vandegrift v. Rediker, 22 N. J. 185.

[5] See Bemis v. Connecticut etc. R. Co. 42 Vt. 375; Eames v. Salem etc. R. Co. 98 Mass. 560; McDonald v. Pittsfield etc. R. Co. 115 Mass. 564; Berry v. St. Louis etc. R. Co. 65 Mo. 172.

[6] Indianapolis etc. R. Co. v. McKinney, 24 Ind. 283; Isbell v. New York etc. R. Co. 27 Conn. 393; Corwin v. New York etc. R. Co. 13 N. Y. 42; Ewing v. Chicago etc. R. Co. 72 Ill. 25; Curry v. Chicago etc. R. Co. 43 Wis. 665.

[7] 10 Cent. L. J. 56; opinion filed November 26, 1879.

very doubtful question upon the authorities, whether a judgment for taxes, as the question has arisen almost exclusively in such cases, is fatally defective when the amounts of tax for which it was rendered is described by numerals, without any mark being used to indicate the denomination or denominations for which they stand. It seems to be thought in New Hampshire, Michigan and Nevada, that such a judgment is not necessarily void by reason of the omission of the dollar mark.[8] While in California, Illinois and Tennessee such an omission would render the judgment void.[9] The Supreme Court of Minnesota recently passed upon this question in *Tidd v. Rines*,[10], in which case such a judgment was declared to be absolutely void.

Exemptions. We come now to notice a case which may be regarded as *sui generis*, the case of *Winland v. Holcomb.*[11] That was a case in which proceedings supplementary to execution had been instituted against the defendant, and the disclosure showed that while the defendant owned a three story brick building exempt from execution as a homestead, inasmuch as he occupied the second story as a residence, yet that he rented the second and third stories for a definite rental and a definite period. The court below had appointed a receiver to collect the rents and apply them to the discharge of the judgment against the defendant. The Supreme Court reversed the order on the ground "that the owner may devote the part of the property exempted, not actually used as a dwelling, to any use he chooses, without removing the exemption from that part." If this decision is to be regarded as the law, then it would seem to be established, in Minnesota, at least, that the profits arising from exempt property are themselves exempt. And the crops growing on a farm of eighty acres (that number of acres being exempt in that State) are exempt from sale on execution, and can not be reached by process as they are grown on an exempt farm, or if the crops have been harvested and sold, and the proceeds deposited in bank, the bank can not be garnisheed, as the money is exempt being the profits realized from a farm exempt from execution. It is not believed that any case exactly similar to this can be found in the reports, and the doctrine it announces may possibly prove a surprise to the legal profession. It is by no means certain that this doctrine will commend itself to the courts of other States.

Partnership Realty. In the case of *Tidd v. Rines*, [12] the Supreme Court of Minnesota was called upon to pass upon the validity of a deed in which the grantee was described as "Todd, Gorton & Co.," it being conceded that the grantee so named was a partnership. The court held that the legal title to the property embraced in the conveyance never passed out of the grantor. It was said that the legal title to real property could only be held by a person or a corporate entity, and that a partnership was not recognized in law as a person. It was conceded by the court, however, that the title was held by the grantor in trust for the sole use and benefit of the firm. Conveyances of real estate for the use and benefit of a partnership have almost universally been made to run to the individual partners jointly as tenants in common, and this is the only instance we now recall in which a court has been compelled to pass upon the validity of a deed drawn as was the one in question. The Supreme Court of Tennessee some years ago passed upon a deed almost similar to the one in question, the conveyance running to "S. L. & Co." And in that case the court held that the legal title passed to "S. L." but that he held the estate clothed with a trust for the "Co." [13] The only difference between the two cases being the omission in the Minnesota case of any initial letters designating the persons composing the partnership. Whether this omission is regarded as sufficient to account for the difference in ruling does not appear from the opinion pronounced, no notice being taken of the Tennessee case, the attention of the court not having been called to it.

Subjects of Counterclaim. In most of the States practicing under the codes a counter claim must arise out one of the following

[8] Cahoon v. Coe, 52 N. H. 524; Bird v. Perkins, 33 Mich. 30; State v. Eureka Consolidated Mining Co. 8 Nev. 15.

[9] Braly v. Seaman, 30 Cal. 610; People v. Savings Union, 31 Cal. 132; Lawrence v. Fast, 20 Ill. 339; Cook v. Norton, 43 Ill. 391; Randolph v. Metcalf, 6 Coldw. 400.

[10] 9 Cent. L. J. 338; opinion filed October 13, 1879.

[11] Opinion filed November 26, 1879.

[12] *Supra*.

[13] Moreau v. Saffarans, 3 Sneed, 595.

causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action; (2) in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. It has been found to be a matter of difficulty to determine exactly what counterclaims are authorized as arising out of a cause of action "which is connected with the subject of the action." The Supreme Court of Minnesota, in the decision we are about to mention, unfortunately fails to examine at length the difficulties connected with the solution of this question, and to discuss the principles involved, for the purpose of laying down some general rule which might serve as a guide to the profession. By far the very best consideration of this subject is to be found in the excellent treatise which Judge Bliss has given the profession on Code Pleading. The importance of the question will justify a quotation of his words at some length. "And before," he says, "we can understand the bearing of the provision, we must clearly appreciate what is meant by the phrase 'subject of the action.' I know of no reason why the same interpretation should not be given to the phrase in this connection as when it is used to designate a class of causes of action that may be united in one proceeding." [14] And in another part of his treatise he defines "the subject of an action" as follows: "The cause of action has been described as being a legal wrong commited against, or an infringement of some legal right of the complaining party; and the object of the action is the redress of the wrong by obtaining some legal relief. The subject of action is clearly neither of these; it is not the wrong which gives the plaintiff the right to ask the interposition of the court, nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen; and this is, ordinarily, the property or the contract and its subject matter, or other thing involved in the dispute. Thus, in an action to recover the possession of land, the right is the right to possession; the wrong is the dispossession; the object is to obtain possession; and the subject, or that in regard to which the action is brought, is the land." [15] The limits of this article will not permit any review of the cases in which the question we are considering has been raised. The treatise we have referred to contains a full examination of the authorities, from which it appears that in most of the States the courts agree with the view of Judge Bliss. In New York, however, a different view prevails, and the term "subject of action," seems to be understood as meaning the same thing as "cause of action." [16] The Supreme Court of Minnesota, in *Goebel v. Hough*,[17] seem to have settled the question in that State, and in accordance with the views expressed by Judge Bliss, although no reference is made to his treatise, or to any of the authorities. The court say, "We think the statute allowing counterclaims, being a remedial statute, should be construed liberally, and thus construing the clause in question a cause of action in a tenant against his landlord for wrongfully interfering with his enjoyment of premises rented is connected with the subject of the action when he is sued by the landlord for rent for a period including that of such interference, sufficiently to make it a counterclaim."

Mortgages.—In the case of *Watkins v. Hackett*,[18] the Supreme Court of Minnesota, in 1873, decided that where a mortgage was executed to secure the payment of money by installments, each of the installments, either of principal or interest, mentioned in such mortgage was to be considered as a separate and independent mortgage of the same land, each being contemporaneous in origin and execution, and being contemporaneous, that neither possessed a superiority over the other, but that the lien of each was subject to the lien of the other; that where a sale was made of the land to satisfy one of the installments it operated to pass only the right, title and interest of the mortgagor at the date of the mortgage, the land being subject to the co-equal lien of the separate and independent

[14] Bliss on Code Pleading, § 373.

[15] Ibid. § 126.

[16] See Edgerton v. Page, 20 N. Y. 281; Borst v. Corey, 15 N. Y. 505; Chamboret v. Cagney, 2 Sweeny, 378.

[17] 10 Cent L. J. 15. Opinion filed October 24, 1879.

[18] 20 Minn. 106.

mortgage or mortgages to secure the remaining installments. This being so, it of course followed that the same land being subject to the mortgage lien for the second and subsequent installments, might after a first sale be sold again to satisfy a second and a third installment. Now in *Fowler v. Johnson*,[19] the court holds that where there is a mortgage containing a power of sale upon only one tract or parcel of land to secure a debt payable in installments, the mortgagee may foreclose upon any installment coming due, but such foreclosure exhausts the lien of the mortgage upon the land sold. The same land can be sold but once under the same mortgage. There can be a second sale to satisfy a subsequent installment only when there remains land not sold at the first sale. This decision is of course diametrically opposed to that announced in the former case, and necessarily results in considerable consternation and no doubt great loss to many mortgagees, who now find their mortgage security to have been frittered away by a foreclosure for an installment of interest. The full bearing of this decision can be better understood when it is known that in Minnesota there is no limited value placed upon a homestead, and a man with a homestead worth $100,000, mortgaged for $30,000, the mortgage having been foreclosed for a semi-annual installment of interest, can, by paying $1,500, redeem from such foreclosure sale and set at defiance his mortgagee, who suddenly awakes to find his security dissolved into thin air, and himself swindled out of $30,000. It would seem as though no court would pronounce a decision of this character if there was any possible escape from it. It must be said, and that with all proper respect for the learning and ability of the court, and in no spirit of captious criticism, that the reasoning upon which the decision is based is somewhat strained, and that the conclusion announced by no means follows from the premises.

We are reminded of a decision made by the Supreme Court of California in McDougal v. Downey,[20] in which it was held that when a mortgage is given to secure money to fall due in several installments from year to year, a judgment enforcing the lien of the mortgage for one installment is not a bar to another action to enforce the lien of the mortgage for another installment subsequently falling due.

[19] Opinion filed January 3, 1880.
[20] 45 Cal. 165.

TITLES OF NEWSPAPERS AND BOOKS. II.

If the right which can be obtained in a title is a right of property, as was held to be the case in Clement v. Maddick, 1 Giff. 98, and Kelly v. Hutton, 16 W. R. 1182, L. R. 3 Ch. 703, and as must be the case if a title is but a species of trade-mark (Leather Cloth Company v. American Leather Cloth Company, 12 W. R. 289, 4 De G. J. & S. 137, and many other cases), the next point to be considered is the mode of acquiring such a right. And in this respect, as well as in others, titles follow the law of trade-marks, with regard to which it was said by Lord Justice Cairns, in Maxwell v. Hogg, 15 W. R. 467, L. R. 2 Ch. 307, that "all the definitions which have been given in this court, of the nature of the right to protection in the case of trade-marks, seem to me to be opposed to the idea that protection can be given where there has been no sale, or offering for sale, of the articles to which the name is to be attached."

In the cross-suits of Maxwell v. Hogg and Hogg v. Maxwell, the question was between persons, on the one hand, who had been the first to register a certain magazine title, *Belgravia*, under the Copyright Acts, and also to publish a magazine under that title, though not until after an interval of some years, and on the other hand, a person who had himself registered the title and gone to considerable expense in advertisements in the interval between the registration and the publication by the original registrants, and had also actually brought out his magazine within a few days after theirs. The lords justices held that no conclusive right was conferred, either by the prior registration and short prior publication in the one instance, or by the expenditure in advertisements in the other. And Lord Justice Turner said that "in the case of advertisement followed by publication, the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement he has neither given, nor come under any obligation to give, anything to the world, so that there is a total want of consideration for the right which he claims;" and Lord Justice Cairns added that he was "prepared to hold, without any hesitation, that the mere intention, and the declaration of intention, to use a name will not create any property in that name, and to hold also that there can be no protection in this court for the intended name during the course of manufacture of the article which is to bear that name."

Mere advertisement of the intention to use a certain name, when not followed by publication, can then give no right in the name, nor can registration under the Copyright Acts do so, as was held in the cross-suit of Hogg v. Maxwell, al-

though in that case there had also been a priority in publication, since the priority was very short in point of time, and such as it was had been obtained by somewhat uncandid means; and in Correspondent Newspaper Company v. Saunders, 13 W. R. 804, 11 Jur. N. S. 540, a case in which the plaintiffs' title was registered on April 8, 1864, and their paper published on May 3, 1865, and the defendants' title was registered on March 3, 1865, and their paper published on May 6, 1865, Vice-Chancellor Wood had previously held that the plaintiffs were unable to avail themselves of the entry in the register without actual publication and, indeed, had doubted whether in any case registration as copyright would protect the title.

When, however, a literary work is actually published under a certain name, and there are no circumstances, as in the two cases last cited, to interfere with the right to the name, a species of good will grows up, and a right of property, which may be of considerable value, is acquired. So far back as the chancellorship of Lord Hardwicke, the connection between the name of a newspaper and the good will therein was clearly recognized (Gibblett v. Read, 9 Mod. 459), and the importance at the present day of the good will, in which the name is unquestionably included, was only fairly stated by the New York Court of Appeal, in Boon v. Moss, 70 N. Y. 465, when the court said that "the good will of a newspaper establishment often constitutes its largest value. * * * * There is one kind of good will which has been said to be only a probability that customers will resort to the old place; and another, far more valuable, when a retiring partner agrees not to engage in the same business in competition with the old establishment. The good will of a permanent newspaper establishment is generally more tangible than either."

The name and good will are not, indeed, sufficiently tangible property to be capable of seizure by a sheriff (*ex parte* Foss, 2 De G. & J. 230), but they are sufficiently so to pass to the proprietor's trustee in bankruptcy, on his becoming unfortunate in business, as being "goods and chattels" under the Bankruptcy Acts (Longman v. Tripp, 2 Bos. & P. N. R. 67; *ex parte* Foss), and they are sufficiently so to be assignable by the proprietor (Snowden v. Noah, Hopk. 347; Kelly v. Hatton, 16 W. R. 1182, L. R. 3 Ch. 703; Ward v. Beeton, 23 W. R. 533, L. R. 19 Eq. 207); and in the event of the sale of a newspaper, what is sold "is not the right to sell one number of it, but continuing to publish it from day to day, it may be as long as the world lasts, under the name by which it has become known," as was said by Vice-Chancellor Malins in Ward v. Beeton.

If the proprietor makes no disposition of the good will and name, but leaves them undisposed of at his death, they will pass to his personal representatives with his other personal property, and must similarly be accounted for by them, Gibblett v. Read, 9 Mod, 459; but it is fully competent to the owner to dispose of them, if he chooses, by will (Keen v. Harris, cited 17 Ves. 338; McCormick v. M'Cubbin, Ct. of Sess. Cas. 1st ser. I. 541); and if only a part share in the property passes under the will, the executors are nevertheless entitled to sell and realize the value of such part share, notwithstanding the opposition of the proprietors of the other part, since they are entitled to derive what benefit they may from the property which comes to them under the will. McCormick v. M'Cubbin.

In Weldon v. Dicks, 27 W. R. 639, L. R. 10 Ch. D. 247, the question was raised how far the proprietor of a book which has been published under a certain title, and has been long out of print, is entitled to restrain the use of the same title for a new and entirely different work. In that case the second edition of the plaintiff's book had been published in 1860, and it was not until the year 1875 that the defendant's work appeared under the same name as a magazine serial story, and it was only in 1877 that it was published in a separate form. Notwithstanding the long apparent neglect of his property by the plaintiff, the court declined to hold that he had surrendered his rights in respect of the name, and an injunction was awarded.

More usually than not the right in the good will and title of a newspaper becomes the property of several joint proprietors, and in such cases the question necessarily arises on a dissolution of the partnership, what is to become of the paper? This question was, however, definitely set at rest by the judgment of Lord Romilly in the *Household Words* case (Bradbury v. Dickens, 27 Beav. 53), in which the popular novelist, Charles Dickens, was the defendant. His lordship there said: "The property in a literary periodical like this is confined purely to the mere title, and the title of this work is *Household Words*, and that forms part of the partnership assets, and must be sold for the benefit of the partners, if it be of any value." He accordingly held that the defendant was not at liberty to advertise the discontinuance of the periodical, since that would be to destroy what was partnership property, although he would be justified in advertising simply the termination of his connection with the paper; and in Dayton v. Wilkes, 17 How. Pr. 510, a judge of the Superior Court of New York came to a similar conclusion that the property in *Wilkes' Spirit of the Times* was partnership assets.

The name of the author of a literary work fills a prominent place in the title-page and, though it would probably not be held to form part of the title (see Crookes v. Petter, 6 Jur. N. S. 1131), is yet intimately connected with it. It may, in fact, and often does, add greatly to its attractiveness, and when exceptionally well known even replaces it as the selling feature in the work. Protection has, therefore, been given to a poet (Lord Byron v. Johnston, 2 Mer. 29) and a legal author (Archbold v. Sweet, 1 M. & Rob. 162) against the unauthorized use of their names, and in Clemens v. Such (July 11, 1873), the improper use of the *nom de plume* of the comic writer, "Mark Twain," was restrained by the Supreme Court of New York.

But the right which an author or editor has to restrain the use of his name may always be limited by contract and, therefore, it was decided in Ward v. Beeton, that the originator and first proprietor of *Beeton's Christmas Annual* was not entitled to complain of the continued publication of the annual under the same title, of which his own name happened to form part, after he had parted with his property in the periodical.

In Crookes v. Petter, 6 Jur. N. S. 1132, Lord Romilly came to the conclusion that the name of an editor appearing on the title-page formed no part of the title, and he, therefore, refused to interfere with the omission of an editor's name from the title-page of a journal, where it had been agreed that the title should not be altered without the mutual consent of the editor and the proprietors.

CRIMINAL PROCEDURE — PRESENCE OF OFFICER IN JURY ROOM.

PEOPLE v. KNAPP.

Supreme Court of Michigan, November 29, 1879.

It is error to permit an officer in charge of a jury to be present during their deliberations, even though he does not speak to them, and it does not appear that any harm has resulted therefrom.

From Lenawee County.

Indictment for adultery.

Attorney-General Krichner for the people; *Millard & Bean*, for respondent.

COOLEY, J., delivered the opinion of the court:

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When the jury retired to consider their verdict, an officer accompanied them and remained in the room during their deliberations. The attention of the court was called to the fact on a motion for a new trial, but on its being made to appear that the officer did not converse with the jury in their room, the court denied the motion. This was on the assumption that under the circumstances the defendant could not have been injured by the officer's presence in the room.

It is not claimed that the officer can with propriety be allowed to be within hearing when the jury are deliberating. Whether he does or does not converse with them, his presence to some extent must operate as a restraint upon their proper freedom of action and expression. When the jury retire from the presence of the court, it is in order that they may have opportunity for private and confidential discussion, and the necessity for this is assumed in every case, and the jury sent out as of course where they do not notify the court that it is not needful. The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they are sent out. And if anyone may be present, why not several? Why may not the officer bring in his friends to listen to what must often be interesting discussions, and then defend his conduct on proof that they did nothing but listen?

But the circumstances of particular cases may make it specially mischievous. In their private deliberations the jury are likely to have occasion to comment with freedom upon the conduct and motives of parties and witnesses, and to express views and beliefs that they could not express publicly without making bitter enemies. Now the law provides no process for ascertaining whether the officer is indifferent and without prejudice or favor as between the parties; and as it is admitted he has no business in the room, it may turn out that he goes there because of his bias, and in order that he may report to a friendly party what may have been said to his prejudice, or that he may protect him against unfavorable comment through the unwillingness of jurors to criticise freely the conduct and motives of one person in the presence of another who is his known friend. Or the officer may be present with a similar purpose to protect a witness whose testimony was likely to be criticised and condemned by some of the jurors.

Suppose some member of the officer's family had given important evidence in the case; what reason can there be for expecting that this evidence would be freely canvassed and carefully considered in his presence? But the case may touch him still more nearly. In criminal cases, especially, officers frequently become important witnesses, and no one can have had much to do with such trials without feeling that unusual care and caution is necessary in the examination and sifting of their evidence in order to guard against a natural tendency to allow the facts to be colored by their prepossession, especially in the case of those they have themselves arrested or accused. If, under such circumstances, the officer may be present when his own evidence is to receive its final sifting, the accused may well suspect he is tried and judged unfairly. Nor will it do to leave the case for subsequent investigation in order to ascertain whether the suspicion is well founded. The time of the court can not be taken up with such inquiries; if it could be the result would not always remove the suspicion. The only proper and just course is to insist upon a rigorous observance of the proper practice, in order to prevent all occasion for injurious suspicions.

The public are concerned in this as well as the accused, and the public is also concerned in not having the deliberations of the jury reported for news-gathers and scandal-mongers outside. Jurors are generally expected to keep their own counsel, because they have an interest in doing so; but the officer is under no corresponding restraint, and it it through him that what takes place in the jury room is most likely to leak out. The courts should see to it that, as far as possible, an officer disposed to do this species of mischief is deprived of the opportunity.

It was held in Cole v. Swan, 4 Greene, 32, that officers having a jury in charge, while they are deliberating on their verdict, should never speak

to them except to ask them whether they have agreed, and that if an officer violated this rule, any verdict afterwards returned, whether the conversation did or did not have any influence in producing the verdict, should be set aside the moment the fact comes to the knowledge of the court. We have said enough already to show that it is not conversation alone that is mischievous; the mere presence of the officer within the hearing of the jury is often quite as much so. In one case what he would say might influence the verdict; in another, what his presence might restrain jurors from saying might accomplish the same result.

It must be certified to the court below that the verdict should be set aside and a new trial granted. The other justices concurred.

MARRIED WOMEN — SEPARATE PROPERTY—POWER TO SUE.

ALT v. MEYER.

St. Louis Court of Appeals, October Term, 1879.

A married woman may bring an action at law in respect to the separate property given her by statute.

Appeal from the Circuit Court of St. Louis County.

BAKEWELL, J., delivered the opinion of the court:

The petition alleges that the plaintiffs are husband and wife, and that plaintiff Magdalena at a date named, being then the wife of her co-plaintiff, was sole owner of a horse and wagon worth three hundred and five dollars, upon which defendant directed to be levied an execution in his favor against plaintiff Henry, and caused the property to be seized and sold under said execution as the property of the husband. There was a verdict and judgment for the plaintiffs. Defendant at the trial objected to a jury on the ground that the proceeding was equitable in its nature. The only question presented by the record is as to the action of the trial court in trying this cause as an action at law.

It is not disputed that Mrs. Alt received this property by gift, since the passage of the act of March 25, 1875. It is by virtue of that statute made her separate property. The language of the law is: "Any personal property belonging to any woman at her marriage, or which may have come to her during coverture, by gift * * * * shall be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband." Rev. Stats. § 3296. Acts of 1875, p. 61.

At common law the chattels personal of the wife in her possession vested in the husband and became absolutely his. Equity recognized a settlement of property in trust for the sole and separate use of the wife, and, if necessary to protect her rights, would in some cases regard the husband as owning such property as her trustee. The effect of our statute is not to create a trust in the husband for the benefit of the wife and to settle certain property upon him or any other trustee for her separate use. The plain intention of the legislature in declaring that certain property shall be the separate property of the wife, is to abrogate *pro tanto* the common law rule and to make the wife the legal owner of personal property acquired by her by gift during coverture or otherwise according to the terms of the statute. In law husband and wife are one person; and the common law does not contemplate the possibility of the wife having a separate ownership of personal property. The statute has effected a change by giving to the wife a separate legal ownership in personalty in which, before the statute, she could have only an equitable beneficial interest, the legal title being in some trustee for her benefit. The statute does not say merely that personalty acquired by her by gift during coverture shall be exempt from execution from her husband's debts, but also that it shall be her separate property. Not that her husband shall hold it as trustee, but that it shall be legally hers. But if the property is legally hers, why shall she not have an action at law against a wrong-doer who invades her right of property? And why can she not sue at law one who takes this property and converts it to his own use? We know of no sufficient reason why the action will not lie. The married woman is the real and only person in interest, and none but she can sue. Her husband must be joined because the practice act directs that this must be done in all cases in which she is a party. But the fact that her husband is a party plaintiff does not convert an action at law to protect her purely legal rights to property of which she is the sole owner into a proceeding in equity.

It is contended that if she can sue at law in regard to this property, it would follow that she could be sued at law, and that execution on a judgment against her might then be levied upon the goods made her separate property by statute; and as this can not be done it is said that she can not be regarded as the legal owner of this property, unmarried as far as her rights thereto are concerned. A judgment against a married woman is at least irregular, and can not be enforced during coverture, and is therefore practically void whilst coverture lasts, and though the legislature has conferred upon married women the legal ownership of personalty it has neither provided that a judgment at law may be rendered against the married woman with respect to such rights, nor that she can sue alone to assert them. But it can not, therefore, be maintained that the legislature in conferring certain property rights on married women, intended that they should be deprived of all remedy in regard to such rights. This would seem to follow, however, if the married woman could not sue at law for the conversion of personalty which is legally hers. If her interest is purely legal, and no equitable interests are involved, what can a court of

equity have to do with the case? The wife formerly had access to a court of equity in proceedings concerning her separate estate. What gave her this access? Undoubtedly the fact that in equity alone could she obtain protection. The common law considered her existence as merged in that of her husband, and, therefore, denied that she could have any separate estate or any interest as distinct from him. As to certain personal property however, the wife is now *sui juris* by statute in Missouri, although she can not sue alone, as is clear from the general language of the statutory prohibition in the practice act, which not having been expressly repealed or modified applies to all cases concerning her property rights. It is not believed that any question could possibly arise in this action which is not cognizable at law. But if there be no such question involved then has equity no jurisdiction. If the wife can not sue at law, then she has a right without a remedy, which is not to be said.

If it be urged that to say that a woman is *sui juris* in regard to property whilst her contracts in regard to it can not be enforced at law, and whilst she can not sue alone to enforce her rights, is to use words in a non-natural sense, we do not know that we need be particularly concerned at this. By law, this property belongs to the wife alone, without any trust, or fiction of trust. The old common law rules as to the rights and duties of married women are being constantly modified by legislation, and tend to complete abrogation. Whilst the laws in regard to husband and wife are in this transition state there will necessarily exist many anomalies, until by legislation and judicial decisions the relations of women shall have been adjusted in accordance with the demands of an altered state of society. It is enough for the purposes of the present case, that no questions which are of equity cognizance could arise in a proceeding of this character.

We think that the learned judge of the circuit court committed no error in submitting to a jury the questions of fact in this case. The judgment is therefore affirmed. LEWIS, P. J., did not sit. HAYDEN, J., concurs.

NEGLIGENCE — MASTER AND SERVANT— FELLOW SERVANTS — CONTRIBUTORY NEGLIGENCE.

HOUGH v. TEXAS & PACIFIC R. CO.

Supreme Court of the United States, October Term, 1879.

1. The general rule exempting the common master from liability to one servant for injuries caused by the negligence of a fellow-servant considered and recognized.

2. But to that rule there are numerous well-defined exceptions, one of which arises from the obligation of the master, whether a natural person or corporation, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.

3. To that end the master, whether a natural person or a corporation, although not to be held as guaranteeing the absolute safety or perfection of machinery or other apparatus provided for the servant, is bound to observe all the care which the exigencies of the situation reasonably require, in furnishing instrumentalities adequately safe for use.

4. Those, at least, in the organization of a railroad corporation who are invested with the controlling or superior duty in that regard, represent its personality; their negligence, from which injury results, is the negligence of the corporation.

5. If the servant, having knowledge of a defect in machinery, gives notice thereof to the proper officer, and is promised that such defect shall be remedied, his subsequent use of the machinery, in the belief, well-grounded, that it will be put in proper condition within a reasonable time, does not necessarily, or as matter of law, make him guilty of contributory negligence. It is for the jury to say whether he was in the exercise of due care in relying upon such promise and in using the machinery after knowledge of its defective or insufficient condition. The burden of proof in such a case is upon the company to show contributory negligence.

In error to the Circuit Court of the United States for the Western District of Texas.*

Mr. Justice HARLAN delivered the opinion of the court:

Plaintiffs in error, the widow and child of W. C. Hough, deceased, seek in this action to recover against the Texas and Pacific Railway Company damages, compensatory and exemplary, on account of his death, which occurred in 1874, while he was in its employment as an engineer.

In substance, the case is this: The evidence in behalf of the plaintiffs tended to show that the engine of which deceased had charge, coming in contact with an animal, was thrown from the track over an embankment, whereby the whistle, fastened to the boiler, was blown or knocked out, and from the opening thus made hot water and steam issued, scalding the deceased to death; that the engine was thrown from the track because the cow-catcher or pilot was defective, and the whistle blown or knocked out because it was insecurely fastened to the boiler; that these defects were owing to the negligence of the company's master mechanic, and of the foreman of the round-house at Marshall; that to the former was committed the exclusive management of the motive power of defendant's line, with full control over all engineers, and with unrestricted power to employ, direct, control and discharge them at pleasure; that all engineers were required to report for orders to those officers, and under their direction alone could engines go out upon the road; that deceased knew of the defective condition of the cow-catcher or pilot, and having complained thereof to both the master-mechanic and foreman of the round-house, he was promised a number of times that the defect should be remedied, but such promises were not kept; that a new pilot was made, but by reason of the negligence of those officers it was not put on the engine. The evidence in behalf of the company conduced to show that the engine was not defective; that due

*For the charge of the judge on the trial in the court below, see 3 Cent. L. J. 447.

care had been exercised as well in its purchase as in the selection of its officers charged with the duty of keeping it in proper condition; that the defective cow-catcher or pilot was not the cause of the engine being thrown from the track; that the whistle was securely fastened, and did not blow out but the cab being torn away the safety valve was opened, whereby the deceased was scalded; that if any of the alleged defects existed it was because of the negligence of the master-mechanic and the foreman of the round-house, for which negligence the company claims it was not responsible.

The principal question arising upon the assignments of error requires the consideration, in some of its aspects, of the general rule exempting the common master from liability to one servant for injuries caused by the negligence of a fellow-servant in the same employment.

"The general rule," said Chief Justice Shaw in Farwell v. Boston etc. R. Co. 4 Met. 49; "resulting from considerations as well of justice as of policy is, that he who engages in the employment of another for the performance of specified duties and services for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation, as in any other." To prevent misapprehension as to the scope of the decision, it was deemed necessary in a subsequent portion of his opinion to add: "We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether for instance, the employer would be responsible to an engineer for the loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of wilful misconduct, or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent in case of an incorporated company, are questions on which we give no opinion."

As to the general doctrine to which we have adverted, very little conflict of opinion is to be found in the adjudged cases, where the court has been at liberty to consider it upon principle, uncontrolled by statutory regulations. The difficulty has been in the practical application of the rule in the special circumstances of particular cases. What are the natural and ordinary risks incident to the work in which the servant engages—what are the perils which in legal contemplation are presumed to be adjusted in the stipulated compensation—who, within the true sense of the rule, or upon grounds of public policy, are to be deemed fellow-servants in the same common adventure or undertaking—are questions in reference to which much contrariety of opinion exists in the courts of the several States. Many of the cases are very wide apart in the solution of those questions.

It would far exceed the limits to be observed in this opinion, and it is not essential in this case, to enter upon an elaborate or critical review of the authorities upon these several points. Nor shall we attempt to lay down any general rule applicable to all cases involving the liability of the common employer to one employee for the negligence of a co-employee in the same service. It is sufficient to say that while the general doctrine, as stated by Chief Justice Shaw, is sustained by elementary writers of high authority, and by numerous adjudications of the American and English courts, there are well defined exceptions which resting, as they clearly do, upon principles of justice, expediency and public policy, have become too firmly established in our jurisprudence to be now disregarded or shaken.

One, and perhaps the most important of those exceptions, arises from the obligation of the master whether a natural person or corporate body, not to expose the servant when conducting the master's business to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery and other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least, in the same work or employment, with whose habits, conduct and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied and public policy requires that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master, has ordinarily no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition, after they have been supplied by the master.

In considering what dangers the servant is presumed to risk, the court, in Union Pacific Railroad Co. v. Fort, 17 Wall. 557, 1 Cent. L. J. 118, said: "But this presumption can not arise where the risk is not within the contract of service, and the servant had no reason to be-

lieve he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparations to an employee in a subordinate position for any injury caused by the wrongful conduct of the persons placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and can not receive our sanction."

A railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all of its departments, are conducted. The latter, in turn, may observe the same caution, in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employees—an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard, represent its personality; their negligence, from which injury results, is the negligence of the corporation. The latter can not, in respect of such matters, interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation.

To guard against misapplication of these principles we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty, in that respect, to its employees is discharged when, but only when, its agents whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees.

The principles we have announced are sustained by the great weight of authority in this country, as an examination of adjudged cases, and elementary treatises, will abundantly show.

A leading case is Ford v. Fitchburg R. Co., 110 Mass. 241. That was an action by an engineer to recover damages for injuries caused by the explosion of his engine, which was old and out of repair. His right to recover was disputed upon the ground that the want of repair of the engine was due to the negligence of fellow-servants in the department of repairs. But the court said: "The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require." In a subsequent portion of the same opinion, the court said: "The corporation is equally chargeable, whether the negligence was in originally failing to provide or in afterwards failing to keep its machinery in safe condition."

The same views, substantially, are expressed by Mr. Wharton in his Treatise on the Law of Negligence. The author (§ 211) says: "The question is that of duty; and without making the unnecessary and inadequate assumption of implied warranty, it is sufficient for the purposes of justice to assert that it is the duty of an employer inviting employees to use his structure and machinery, to use proper care and diligence to make such structure and machinery fit for use." Again (§212): "At the same time we must remember that where a master personally, or through his representatives, exercises due care in the purchase or construction of buildings and machinery, and in their repair, he can not be made liable for injuries which arise from casualties against which such care would not protect. It is otherwise if there be a lack in such care, either by himself or his representatives. The duty of repairing is his own; and, as we shall hereafter see, the better opinion is that he is directly liable for the negligence of agents when acting in this respect in his behalf. If the master 'knows or in the exercise of due care might have known, that * * * * his structure or engines were insufficient, either at the time of procuring them, or at any subsequent time, he fails in his duty." Still further, in reference to the obligation upon the master to supply suitable machinery for working use (§ 232 *a*): "It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases in which it is impossible for it to be negligent per-

sonally. But if this be true, it would relieve corporations from all liability to servants. The true view is that as the corporation can act only through superintending officers, the negligences of those officers, in respect to other servants, are the negligences of the corporation."

The current of decisions in this country is in the same direction, as will be seen from an examination of the authorities, some of which are cited in the note at the end of this opinion.

It is, however, insisted that the defence is sustained by the settled course of decisions in the English courts. It is undoubtedly true that the general doctrine of the immunity of the master from responsibility for injuries received by his servant from a fellow-servant in the same employment has, in some cases, been carried much further by the English than by the American courts. But we can not see that upon the precise question we have been considering there is any substantial conflict between them. That question was not, as is supposed, involved, it certainly was not decided, in Priestly v. Fowler, 3 M. & W. 1. The decision there was placed by Lord Abinger, partly upon the ground that in the "sort of employment especially described in the declaration, [transporting goods of the master by one servant, in a van conducted by another of his servants], * * * * the plaintiff must have known as well as the master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely." But even in that case, although the court declared it was not called upon to decide how far knowledge upon the part of the master, of vices or imperfections in the carriage used by the servant injured would make him liable, it was said: "He (the master) is, no doubt, bound to provide for the safety of the servant in the course of his employment, to the best of his judgment, information and belief."

The question came before the House of Lords in Patterson v. Wallace, 1 Macq. H. L. Cas. 748, and, again, in 1858, in Bartonshill Coal Co. v. Reid, 3 Id. 288. In the last-named case, Lord Cranworth said that it was a principle established by many preceding cases, "that when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks." This he held to be the law in both Scotland and England. At the same sitting of the House of Lords, Bartonshill Coal Co. v. McGuire, 3 Id. 307, was determined. In that case Lord Chancellor Chelmsford delivered the principal opinion, concurring in what was said in the Reid case. After referring to the general doctrine as announced in Priestly v. Fowler, and recognized subsequently in other cases in the English courts, he said: "In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,'" and perhaps, it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case to ascertain whether the fellow-servants are fellow-laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he can not be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him." Upon the same occasion Lord Brougham, referring to the remark of a Scotch judge to the effect that an absolute and inflexible rule, releasing the master from responsibility in every case where one servant is injured by the fault of another, was utterly unknown to the law of Scotland, said: "But, my lords, it is utterly unknown to the laws of England also. To bring the case within the exemption there must be this most material qualification, that the two servants shall be men in the same common employment, and engaged in the same common work under that employment." 3 Id. 313.

An instructive case is Clarke v. Holmes, decided in 1862, in the Exchequer Chamber upon appeal from the Court of Exchequer, 7 H. & N. 937. There, the plaintiff was employed by the defendant to oil dangerous machinery, and he was injured in consequence of its remaining unfenced. He had complained of the condition of the machinery, and the manager of the defendant, in the latter's presence, promised that the fencing should be restored. In the course of the argument counsel for the defendant relied upon Priestly v. Fowler, claiming it to have decided that whenever a servant accepts a dangerous occupation he must bear the risk. He was, however, interrupted by Cockburn, C. J., with the remark: "That is, whatever is fairly within the scope of the occupation, including the negligence of fellow-servants; here it is the negligence of the master." Crompton, J., also said: "It can not be made part of the contract that the master shall not be liable for his own negligence." In the opinion delivered by Cockburn, C. J., it was said: "I consider the doctrine laid down by the House of Lords in the case of Bartonshill Coal Co. v. Reid, as the law of Scotland with reference to the duty of a master as applicable to the law of England also, namely, that when a servant is employed on machinery from the use of which danger may arise, it is the duty of the master to take due care, and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur." Again in the same opinion: "The rule I am laying down goes only to this, that the danger contemplated on entering into the contract, shall not be aggravated by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract, or the nature of the employment, the servant had a right to expect that it would be kept."

Byles, J.: "But I think the master liable on the broader ground, to wit: That the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. * * * * The master is neither, on the one hand, at liberty to neglect all care, nor on the other, is he to insure safety, but he is to use due and reasonable care. * * * * Why may not the master be guilty of negligence, by his manager or agent, whose employment may be so distinct from that of the injured servant that they can not with propriety be deemed fellow-servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less will he be liable." To the same effect is the recent case of Murray v. Phillips, decided in 1876 in the Exchequer Division of the High Court of Justice. 35 L. T. Rep. 477.

It is scarcely necessary to say that the jury were not correctly informed by the court below as to the legal principles governing this case. It is impossible to reconcile the general charge, or the specific instructions with the rules which we have laid down. They were, taken together, equivalent to a peremptory instruction to find for the company. The jury may have believed from the evidence, that the defects complained of constituted the efficient proximate cause of the death of the engineer; that such defects would not have existed had the master-mechanic and foreman of the round-house exercised reasonable care and diligence in the discharge of their respective duties touching the machinery and physical appliances supplied to employees engaged in running trains; and that the deceased was not chargeable with contributory negligence; yet, consistently with any fair interpretation of the charge, and the specific instructions, they were precluded from finding a verdict against the company.

One other question, arising upon the instructions, and which has been discussed with some fullness by counsel, deserves notice at our hands. It is contended by counsel that the engineer was guilty of such contributory negligence as to prevent the plaintiffs from recovering. The instruction upon that branch of the case was misleading and erroneous.

The defect in the engine, of which the engineer had knowledge, was that which existed in the cow catcher or pilot. It is not claimed that he was aware of the insufficient fastening of the whistle, or that the defect, if any, in that respect, was of such a character that he should have become advised of it while using the engine on the road. But he did have knowledge of the defective condition of the cow-catcher or pilot, and complained thereof to both the master-mechanic and the foreman of the round house. They promised that it should be promptly remedied, and it may be that he continued to use the engine in the belief that the defect would be removed. The court below seem to attach no consequence to the complaint made by the engineer, followed as it was by explicit assurances that the defect should be remedied. According to the instructions, if the engineer used the engine with knowledge of the defect, the jury should find for the company, although he may have been jnstified in relying upon those assurances.

If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition. But "there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept." Sherman & Redfield on Negligence, sec. 96; Conroy v. Vulcan Iron Works, 62 Mo. 38; Patterson v. P. & C. R. W. Co. 76 Pa. St. 389; Le Clair v. R. Co. 20 Minn. 9; Brabbits v. R. Co. 38 Mo. 289; Ford v. Fitchburg R. Co. *supra*. "If the servant," says Mr. Cooley in his work on Torts, 559, "having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks." And such seems to be the rule recognized in the English courts. Holmes v. Worthington, 2 Fos. & Fin. 535; Holmes v. Clark, 6 H. & N. 349; Clark v. Holmes, 7 Hur. & N. 942. We may add that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances and as matter of law, absolutely conclusive of want of due care on his part. 110 Mass. 261; 49 N. Y. 521. In such a case as that here presented, the burden of proof to show contributory negligence was upon the defendant. Railroad Co. v. Gladmon, 15 Wall. 401; Wharton's Law of Negligence, sec. 423, and authorities there cited in note 1; 93 U. S. 291.

Our attention has been called to two cases determined in the Supreme Court of Texas, and which, it is urged, sustain the principles announced in the court below. After a careful consideration of these cases we are of opinion that they do

not necessarily conflict with the conclusions we have reached. Be this as it may, the questions before us, in the absence of positive statute, depend upon principles of general law, and in their determination we are not required to follow the decisions of the State courts.

The judgment is reversed and the cause remanded, with directions to set aside the verdict and award a new trial, and for such other proceedings as may be consistent with this opinion.

NOTE.—73 N. Y. 40; 49 N. Y. 530; 53 N. Y. 551; 59 N. Y. 517; 13 Allen, 440; 48 Me. 116; 66 Me. 425. 3 Dillon, 321; 55 Ill. 492; 45 Ill. 197; 60 Ill. 175; 8 Allen, 441; 1 Coldw. 613; 38 Wis. 293; 78 Pa St. 32; 46 Mo. 169; 20 Minn. 9; 3 Sawyer, 444; Wharton's Law of Negligence, 2d. ed. sec. 199 to 242 and notes. See also 9 Cent. L. J. 17, 38, 156; Smith v. St. Louis, etc. R. Co., 9 Cent. L. J. 51; 8 Cent. L. J. 22; Baldwin v. Chicago, etc. R. Co., 8 Cent. L. J. 497; Ohio, etc. R. Co. v. Collarn, 8 Cent. L. J. 12; 7 Cent. L. J. 118, 418, 138, 305; 6 Cent. L. J. 16, 19, 275; Smith v. Chicago, etc. R. Co., 5 Cent. L. J, 424; 4 Cent. L. J. 263, 334, 384; Gildersleeve v. Ft. Wayne, etc. R. Co., 3 Cent. L. J. 231; 3 Cent. L. J. 441, 442; Porter v. Hannibal, etc. R. Co., 2 Cent. L. J. 384; 1 Cent. L. J. 420, 575.

ABSTRACTS OF RECENT DECISIONS.

UNITED STATES CIRCUIT AND DISTRICT COURTS.

STOCKHOLDERS IN NATIONAL BANKS—LIABILITY.—S bought shares in a National bank and caused them to be transferred to E, who was in his employ, S remaining the real owner. *Held*, that S was liable as a stockholder upon the failure of the bank.—*Davis v. Stevens*. United States Circuit Court, Southern District of New York. Opinion by WAITE, C. J. 20 Alb. L. J. 490.

REVENUE LAWS — SUFFERING DISTILLERY ON PREMISES—KNOWLEDGE.—A horse, truck and harness, belonging to the plaintiff, were seized upon premises used in part for an illicit distillery. In examining the claimant on his own behalf the question whether he knew that the building was being used as a still was excluded as immaterial, under secs. 3281 and 3242, Rev. Stats. *Held*, that the question was improperly excluded, the law requiring that the plaintiff should know of the existence of the still to render him liable.—*Gregory v. United States*. United States Circuit Court, Southern District of New York. Opinion by BLATCHFORD, J. 26 Int. Rev. Rec. 27.

ADMIRALTY JURISDICTION—FLOATING DRY DOCK.—1. The jurisdiction of admiralty, as respects torts, depends entirely on locality. If committed on the high seas or other navigable waters, the jurisdiction is unquestionable. The character of the object injured or of the thing by which injury is inflicted is unimportant. 2. The dry dock of the libellant floating in the Delaware, moored to a wharf, having been injured by the negligence of the respondent's tug: *Held*. that the jurisdiction of the court of admiralty attached.—*The Ceres*. United States District Court, Western District of Pennsylvania. Opinion by BUTLER, J. 7 W. N. 576.

OFFICIAL BONDS—SURETIES—LIABILITY.—Where the official bond of a public officer is conditioned that he "shall faithfully perform his duties" as such officer, the sureties thereon are liable for the faithful performance of all duties imposed upon the officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belong to and come within the scope of the particular office. Thus, where after the execution of the bond of a collector of internal revenue as disbursing agent, a statute provided for the appointment of internal revenue storekeepers and imposed upon internal revenue collectors in the several districts as disbursing agents, the duty of paying such storekeepers from funds advanced by the government for that purpose, such duty is within the scope of the office, and the sureties on the bond are liable for any failure of duty of the collector in respect thereto.—*United States v. McCartney*. United States District Court, District of Massachusetts. Opinion by LOWELL, J. 26 Int. Rev. Rec. 28.

ACTION — SUIT IN ANOTHER JURISDICTION NO BAR.—The pendency of a prior suit in one jurisdiction is no bar to a subsequent suit in another jurisdiction, even though the two suits are for the same cause of action. GRESHAM, J. (full opinion): "This is a suit brought by the First National Bank of Auburn, Indiana, against George Hazzard, Nicholas Ensley and Thomas J. Cuppy, as joint makers, and Joseph R. Lanning as indorser of a promissory note for $1,000, The defendant Ensly pleads in abatement that before the commencement of this action he filed his complaint in the De Kalb Circuit Court, in this State, against the plaintiff, in which he alleged that as holder of said note the plaintiff was threatening suit to collect the same; that the note was never executed by the defendant; that as to him it was a forgery; and prayed that it might be declared fraudulent and void as to him, and that the plaintiff might be enjoined from any attempt to enforce payment from the defendant; that the De Kalb Circuit Court was a court of general jurisdiction with full authority to hear and determine the matter in controversy; that process had been duly served on the plaintiff, and that the suit was still pending. The plaintiff demurs to the plea. It is not necessary to cite authorities in support of the proposition that a second suit can not be maintained between the same parties for the same cause in the same jurisdiction while another action is still pending. And the fact that the parties are not in the same relation in both suits would seem to be immaterial. In the suit in the State court. Nicholas Ensley, one of the alleged joint makers, is plaintiff, and the Auburn National Bank is sole defendant, while in this suit the Auburn National Bank is plaintiff and all three of the alleged makers and the indorser are defendants. The note is joint and the holder must sue all the makers. The pendency of the first suit is no reason for abating the second, unless the first affords the holder of the note, the plaintiff in this suit, a full, plain and adequate remedy to collect his debt. The instrument being joint only, if the plaintiff takes judgment here against Hazzard and Cuppy, the makers who set up no defense, the note will be merged and no subsequent suit can be maintained against Ensley, even if he fails in his controversy in the State court. It is urged, however, that the plaintiff in this suit can delay further action until the suit in the State court is determined. But, meantime, other creditors may take judgments against Hazzard and Cuppy, or they may become insolvent. Stanton v. Embrey, 3 Otto, 548, was a suit brought in the Supreme Court of the District of Columbia for professional services alleged to have been performed by the plaintiff in prosecuting a claim against the

United States before the third auditor of the treasury. The defendants pleaded in abatement the pendency of a suit against them by the same plaintiff, and for the same cause of action, in the Superior Court of the County of New London, in the State of Connecticut, to which plea the plaintiff demurred. The demurrer was sustained, and the case was taken to the Supreme Court on this and other alleged errors, where the judgment of the court below was affirmed. "It is insisted by the defendant in error," says Mr. Justice Clifford, in delivering the opinion of the court, "that the pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit in the circuit court or in the court below, even though the two suits are for the same cause of action, and the court here concurs in that proposition." The court further says in this case that repeated attempts have been made to maintain the contrary of this proposition, but the weight of authority is the other way. Although the De Kalb Circuit Court is within this district, that court and this are in different jurisdictions. Demurrer sustained. —*First Nat. Bank of Auburn v. Hazzard.* United States District Court, District of Indiana.

SUPREME JUDICIAL COURT OF MAINE.

May Term, 1879.

AGREEMENT TO ARBITRATE—REVOCATION—DAMAGES.—1. A mutual agreement in writing to refer to certain specified referees is a contract binding on the parties to the same. For a breach of this contract damages may be recovered. 2. No set form of words is necessary to constitute a revocation. The intent is to govern. 3. The party revoking a submission, without good cause, is liable to the other party for damages arising from such revocation, including loss of time and trouble, expense of witnesses, reasonable fees of counsel and other expenses necessarily incurred. Opinion by APPLETON; C. J.—*Call v. Hagar.*

CANCELLATION OF MORTGAGE — SUBROGATION — MISTAKE.—1. Equity may annul the cancellation of the record of a mortgage against a grantee whose deed is made "subject to the mortgage," when the cancellation was made in ignorance of the existence of such deed. And this, too, even though the deed was duly recorded, if the junior mortgagee, who paid and caused the senior mortgage to be cancelled, was not guilty of culpable negligence in the premises. 2. When such subsequent mortgagee, ignorant of a prior deed, and *bona fide* relying upon his mortgage, pays the sum due on the senior mortgage for his own benefit, and allows it to be discharged and its registration cancelled, the cancellation and discharge may be annulled and he subrogated to the rights of the senior mortgagee. Opinion by VIRGIN, J.—*Cobb v. Dyer.*

SLANDER—ACTIONABLE WORDS— AMENDMENT.—1. To speak of and concerning the plaintiff, "he has not been able to do any work for the last three or four years; that he was about dead with the bad disease, and that he died with it;" is not actionable. The words do not import a charge of having a loathsome or contagious disease, this being necessary in actions for such slanders. 2. Motions for amendments should be passed upon by the court at *nisi prius*. Amendments which do not appear to be for the same cause of action set out in the declaration are not allowable. 3. Where the words spoken, upon which the plaintiff relies, are proved, if there appears to be a variance between the allegations in the declaration and such word in the tense of the verb, or in some other particular, and still the judge can see that the cause of action is substantially the same, it will be competent for him to allow the necessary amendment to obviate the variance on such terms as he may deem just. Opinion by LIBBEY, J.—*Bruce v. Soule.*

ACTION ON MARINE POLICY—INVOICES AND BILLS OF LADING NOT ADMISSIBLE TO SHOW LOSS—DUTY OF AUDITOR AS TO EVIDENCE.—1. Invoices, bills of lading or protests are not admissible as evidence in a suit upon an insurance policy, to show the loss sustained by the person insured. The papers were not legal evidence. They were merely the statements of the plaintiffs themselves or of third persons. An invoice is usually a paper made out by the owner or shipper of the cargo. Lord Ellenborough (Dickerson v. Lodge, 1 Stark. 226) said a bill of lading was "nothing more than the declaration of the captain." Lord Tenterden (Abb. Ship. 380 English paging) styles a protest "a declaration or narrative by the master," and says "it can not be received in evidence for the masters and owners, but may be received against him or them." Lord Kenyon entertained the same view. Christian v. Coombs, 2 Esp. 489. In Senat v. Porter, 7 T. R. 158, its admissibility was not regarded as "an arguable question." A ship's log (similar to a protest in character) is the only evidence to contradict a witness who has kept it. Rundle v. Beaumont, 4 Bing. 537; United States v. Gibert, 2 Sum. (C. C.) 19; Dickerson, J., in Stephenson v. Piscataquis F, & M. Ins. Co., 54 Maine, 73, speaking of a survey (a document of similar import) says, "neither plaintiff nor defendant can use such a document in evidence without consent." 2. An auditor can not, on a hearing before him, receive anything but legal evidence. The rule is correctly stated in Oliver's Precedents (Account), that "their (auditors') report may be objected to, either on account of any mistake of the law, or any improper admission or rejection of evidence, or because they have taken into consideration matters not submitted to them." This accords with the practice observed in many cases. An auditor can not decide the question of costs. Fisk v. Gray, 100 Mass. 191. Has no authority to disallow an item allowed by the pleadings. Snowling v. Plummer Granite Co. 108 Mass. 100. Could not allow a person to testify who was interested as bail of the party calling him. Newton v. Higgins, 2 Vt. 366. Nor allow an interested witness to testify, although the party himself could. McConnell v. Pike, 3 Vt. 595. Nor receive oral testimony of the contents of a paper that could be produced. Putnam v. Goodall, 31 N. H. 419. Depositions for defects should be objected to before auditor, or the objection is removed by afterwards using them in court. Gould v. Hawkes, 1 Allen, 170. If the evidence is immaterial and not prejudicial to the dissenting party, its wrongful admission is not sufficient to set an award aside. Kendrick v. Tarbell, 37 Vt. 512. Very many cases might be added. These, for illustration, will suffice. Opinion by PETERS, J.—*Paine v. Maine Marine Ins. Co.*

SUPREME COURT OF INDIANA.

December, 1879.

CRIMINAL LAW—COMPETENCY OF JUROR — PREJUDICE.—Appellant was convicted of keeping a liquor saloon in a disorderly manner. At the trial, one of the jurors, upon his *voire dire*, gave the following answers to questions put to him: "Do you think a man who is engaged in selling intoxicating liquor under a license is engaged in a legitimate business." An-

swer. "I never thought it a legitimate business, although the law did grant it?" "Do you think a man engaged in the sale of liquor under a license is a moral man?" Answer: "I think not. I think him immoral." To a further question the juror answered that he had not such prejudice as would influence him in determining the cause; that he could give the defendant a fair and impartial trial according to the law and the evidence. *Held*, that the juror was not competent to serve in the cause. He might have been put in a position by the evidence which would require him to either break the law or violate his moral sense. The law is to be administered on legal grounds only, and what the law authorizes it will not hold immoral. Reversed. Opinion by BIDDLE, J.—*Swigart v. State.*

CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES.—Indictment and conviction for obtaining money and a promissory note under false pretenses. The indictment charged that the defendant procured the money and note from the prosecuting witness by representing that he was an officer and had a warrant for the arrest of said witness for forgery, and that on the payment to him of the money and note he would not arrest him, but would compromise and settle the matter, otherwise he would arrest and imprison him, etc. *Held*, that the false pretenses by which a thing of value is obtained to be criminal must be such as would deceive a person of ordinary sense, prudence and caution, and induce him to part with the thing obtained from him; that they must be made of some existing state of facts, for if made of facts to occur in the future, which may never exist, they will not be sufficient, however false and criminal they may be. In this case the pretense alleged is that defendant had the warrant and the power to arrest the witness, but would not arrest him if he would comply with his terms. If the pretense had been true, namely, that defendant was an officer and had the warrant, he could have lawfully arrested witness. Add to this the pretense that if he did not comply with his demands he would arrest him, and they were well calculated to deceive a person of ordinary sense, prudence and caution. 14 Wend. 546; 4 Hill, 9; 47 N. Y. 303; 17 Maine, 211; 31 Ind. 192; 56 Ind. 245; 64 Ind. 498. Affirmed. Opinion by BIDDLE, J.—*Perkins v. State.*

INDICTMENT FOR SELLING LIQUOR — INFERENCE AS TO QUANTITY.—The indictment charged appellant with selling intoxicating liquors, to wit: "One gill to one Franklin Churchill." Appellant pleaded guilty and was fined. He appealed on the ground that the facts alleged in the indictment do not constitute an offense. WORDEN, J., says: "It is not unlawful to sell intoxicating liquor to a minor by a greater quantity than one quart at a time. Does the indictment show that the quantity sold by the appellant was less than a quart? It need not allege the specific quantity sold, if it show that the quantity was less than a quart. In this case the indictment does not allege that the quantity sold was less than a quart, nor that the defendant sold the gill and no more. The question is not whether the courts will take notice of the standards of measure, and therefore that a gill is less than a quart; but whether the courts will or can legally assume that because the appellant sold a gill he did not sell any more at the same time, and therefore that he committed an offense. This would be assuming what is not charged in the indictment and making out an offense by an unauthorized inference. It may be true that the appellant sold the gill of liquor, and yet he may not have been guilty of any offense, because the gill may have been but a part of a larger quantity sold. The fallacy of the contrary view lies in assuming that because appellant sold a gill, he did not sell a larger quantity at the same time. If the appellant had sold a gallon or a barrel he would have been guilty of no offense whatever; and yet it would be true that he sold a gill. 21 Ind. 160-276, 23 Pick. 275. Contrary to this doctrine are 4 Ind. 407; 23 Ind. 111-127. The indictment should show by its averments that the quantity of liquor sold was less than a quart and not leave the matter to rest upon inference or conjecture. Judgment reversed."—*Arbintrode v. State.*

SUPREME COURT OF KANSAS.

January, 1880.

DEMURRER TO EVIDENCE—PRACTICE.—Where, on the trial of a case, the trial court sustained a demurrer to the plaintiff's evidence, and then renders judgment in favor of the defendant and against the plaintiff for costs; and on the fifth day thereafter the plaintiff files a motion for a new trial, which motion was overruled by the court: *Held*, that the judgment of the court below must be affirmed; that in order to enable the Supreme Court to review the decision of the trial court on the demurrer it is necessary that a motion for a new trial should be made, and that it should be filed within three days after the decision of the trial court is rendered. Affirmed. Opinion PER CURIAM.—*Gruble v. Ryus.*

PRACTICE—AMENDMENT—ABUSE OF DISCRETION.—Where an action is commenced before a justice of the peace under ch. 113 of the Gen. Stats., both as a civil and a criminal action, and is afterwards carried through that court and the district court to the Supreme Court, where the judgment of the district court is reversed, because of the improper joinder of a civil with a criminal action, and the cause is then remanded to the district court for further proceeding, where the person who first instituted the action moves for leave to amend the bill of particulars so as virtually to dismiss the criminal branch of the action and leave the civil branch for further prosecution, with himself as the plaintiff, and the district court overrules the motion, and then on motion of the defendant dismisses the entire action: *Held*, that in view of the peculiar language of said statute which seemingly authorizes the joinder of such actions, the court should have permitted the amendment upon the payment of such proportion of costs already accrued as could reasonably be chargeable to the criminal branch of the case. Reversed. Opinion by VALLNTINE, J. All the justices concurring.—*Fetter v. Manville.*

NUISANCE—ABATEMENT—LACHES — UNREASONABLY DELAY.—In 1874 W & S constructed a flouring mill on Chisholm creek, in Sedgwick county, to be run by water; for the more efficient operation of the mill, they diverted one-half of the water of the Little Arkansas river to said creek by means of a dam about five feet high across the Little Arkansas, and a trench or race-course from said river to the creek; these improvements cost about $30,000. In the summer of 1875, the mill property was sold to T for $22,000, and he at once sold certain interests in the mill to others, and said owners then made additional improvements to the value of $7,000. In 1876, E & L became the sole owners of all the mill property. The dam has been washed out three times, and rebuilt each time. Two of the washouts occurred after the fall of 1876. The effect of this diversion of water on the river below the dam caused the accumulation of sand bars at the mouth of the river, by which the water becomes sluggish and grass grows in the river, which at times decays and is offensive to the smell, and also renders the water unfit for bathing purposes. One W has had

since 1874 a residence and improvements on several acres of valuable land about five miles below the dam, upon the east bank of the Little Arkansas, one mile from its confluence with the Arkansas river, and within the limits of Wichita, W discovered in the summer of 1876 that the odor arising from the grass which accumulated and decayed in the river near his premises was exceedingly offensive to him and his family and injurious to his residence as a desirable home. He deferred making any active opposition to the diversion of water till March 14, 1878, when he commenced a suit to remove the dam, to fill up the trench or race course, and to stop the diversion of water from the Little Arkansas to Chisholm creek. *Held*, that having delayed so long in his legal opposition to the diversion of the water from the Little Arkansas, and the dam having been twice rebuilt after he had become fully acquainted with the consequences to him and his property of such diversion, he has deprived himself of the right to the interference of a court of equity, and his claim for equitable relief must be denied. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*Thomas v. Woodman*.

DEMANDS IN PROBATE COURTS —ACTION UPON MERITS—DELAY IN EXHIBITION OF DEMANDS—LIMITATION OF REVIVOR:—1. A judgment against a deceased person is not a judgment against his administrator or against his estate until after it has been revived against his administrator, but is merely a demand against the estate. 2. Such a judgment can not be classified by the probate court until after it has been established against the administrator by revivor or otherwise. 3. The mere filing of such a judgment for classification and its classification by the probate court, do not amount to anything in law. 4. A suit against the obligors of an administrator's bond (including the administrator as one of the obligors), for an alleged breach of the bond, is not a suit against the administrator in his representative capacity, nor is it a suit against his intestate's estate, in any form or manner; nor is it a suit on any demand against the estate; and where the plaintiffs fail in such a suit because it is shown that there has been no breach of the bond, they do not fail "other than upon the merits." 5. Where a party fails to exhibit his demand against an estate for over three years after letters of administration have been granted (and he does not come within any of the exceptions), his claim is barred by sec. eighty-one of the executors and administrator's act; and this includes claims founded upon judgments for money rendered against the deceased in his lifetime, which judgments have not been revived against the administrator. 6. Where a party holding a claim against an estate fails to commence proceedings in any court to establish it (by suit, revivor or otherwise) against the administrator for more than three years after the administrator has given bond and due notice of his appointment, such claim is barred by sec. 106 of executors and administrator's act; and this includes claims founded on judgments for money rendered against the deceased in his lifetime. 7. A notice of the appointment of an administrator is duly given in accordance with sec. twenty-nine of the executors and administrator's act, where it is published three consecutive times in a weekly newspaper published, and of general circulation in the county where the letters of administration are granted. 8. A judgment creditor holding a money judgment against a deceased person, can not revive it against the administrator of such deceased person against the will of such administrator, unless he does it within one year after the appointment and qualification of such administration. Civil Code, secs. 433, 439. Affirmed. Opinion by VALENTINE, J. All the justices concurring.—*Tutt v. Scroggs*.

SUPREME COURT OF WISCONSIN.

November-December, 1879.

NEGLIGENCE—MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.—1. It is a general rule, applicable to all kinds of service, that a master who negligently fails to furnish his servant with safe machinery, means and appliances for doing the work required to be done, is liable for injuries to the servant caused by such negligence. 2. The common seaman in a vessel at sea is bound to submit to the judgment and discretion of the master, and obey his orders, in the management of the vessel and its repairs, especially in rough weather and cases of emergency; and the fact that the seaman, on receiving from the master an order otherwise lawful, and being imperatively commanded to perform it in a manner or by means which he regards as unnecessarily dangerous, does not refuse to so perform it, or undertake then and there to withdraw from the service, will not prevent his recovering for personal injuries caused by the master's fault. 3. The owners of a vessel, as well as the master, are liable for injuries caused by the negligence or unskilfulness of the master, provided the act be done within the scope of his authority as such. Reversed. Opinion by ORTON, J.—*Thompson v. Hermann*.

PARTNERSHIP—PAYMENT—PRESUMPTION.—The taking, not as payment, of the individual note of one partner for money loaned, though it may be evidence that the loan was not made to the firm, is not conclusive of that fact. 2. Where such individual note of one partner is taken for a loan made at the time to the firm, the presumption is that it was not taken as payment. A remark of Dixon, C. J., in Ford v. Mitchell, 15 Wis. 304, doubted, but distinguished. 3. The complaint avers, in substance, that on, etc., S, as partner in the then existing firm of W & S, borrowed from plaintiff, for and on account of and for the use of said firm, a certain sum, which loan was evidenced by a note for the amount signed by S, dated on the same day, and that the money so loaned was expended for the use of the firm. *Held*, that under these averments plaintiff may show that the money was loaned by him to and upon the credit of the firm. There is no admission that the note was taken in payment, and the complaint is good on demurrer. Opinion by TAYLOR, J.—*Hoeflinger v. Wells*.

EMINENT DOMAIN—EVIDENCE OF DAMAGE—OPINION—INTEREST.—1. Under the circumstances of this case, *held*, that the whole of a certain statement, relied on by the respondent as admitted, must be considered as in evidence, or no part of it. 2. In an action for damages for the taking of part of plaintiff's block in a city for a railway, a witness for plaintiff who had acted for several years as his agent in looking after the block, had paid taxes, given leases and collected rents thereon, received offers to purchase, and was personally acquainted with the block, both before and after the taking, *held* competent to testify, not only to the value of the strip taken, but also to the depreciation in value of the remainder of the block, by reason of the taking for railway purposes. 3. A witness who had testified fully as to the actual value of the whole block, both before and after the taking, was asked what a particular front of said block was worth before the road was constructed. *Held*, that there was no error in excluding the question. 4. Plaintiff having proven title to the land to the water's edge, defendant introduced evidence that the land taken was not above the water's edge, but was made beyond it by means of a breakwater and cribs extending into the water. *Held*, that there was no error in permitting

plaintiff then to show that the breakwater and cribs were not built beyond the water's edge; the evidence being properly in rebuttal. 5. Where the jury being instructed that plaintiff, if he recovered, was entitled to interest, found his damages at a certain sum, it must be presumed that this included the interest; and a judgment taken for a larger sum, including interes on that named in the verdict, is reversed, with direct tions to grant a new trial unless plaintiff remit the excess. Reversed. Opinion by COLE, J.—*Diedrichs v. Northwestern &c. R. Co.*

LEASE — STATUTE OF FRAUDS — TENANT FROM YEAR TO YEAR.—K attempted orally to lease premises to G for two years at a specified sum per year, payable "at such times during the term as plaintiff should require;" and G went into possession under the lease, and remained in possession twenty months, paying the first year the specified rent therefor when demanded, and also paying at the same rate until the end of the next six months. *Held*, that though the lease was void by the statute of frauds, G became a tenant from year to year on the terms therein stipulated. Affirmed. Opinion by COLE, J.—*Koplitz v. Gustavus.*

KENTUCKY COURT OF APPEALS.

December, 1879.

LARCENY — SEVERAL ARTICLES TAKEN AT SAME TIME CONSTITUTE BUT ONE OFFENSE— EXTENT OF RULE.—1. Larceny is an offense against the public, and the offense is the same whether the property stolen belonged to one person or to several jointly, or to several persons, each owning distinct parcels. If a flock of sheep, of which A owns five, B five and C five, be feloniously asported by one and the same act, there are three trespasses, but only one larceny. It is therefore proper that the jury should, in determining the value of the property, in order to ascertain the grade of the offense, include in the estimate all the property stolen at the same time, whether it belong to one or to several persons. 2. But the property must be taken at the same time, and if the articles stolen were but 200 yards distant, it is the same as though they were two miles, and each act constitutes a distinct offense. Reversed. Opinion by COFER, J.—*Nichols v. Com.*

MUTUAL BENEFIT INSURANCE — MONEY DUE TO BENEFICIARY SUBJECT TO ATTACHMENT. — One J M was a member of a Masonic mutual life insurance company. By his death the defendant became entitled to receive from the company, on account of his father's membership, $100. This sum was attached in the hands of the company by the plaintiff. Without controverting the demand against him, or the grounds for attachment, the defendant claimed that his interest in the money could not be subjected to his debts because of sec. twelve of the company's charter, which reads as follows: "No part of the stock or interest of any member, or his widow or children may have in said institution, shall be subject to any debt, liability or legal or equitable process against him or any of them." The court below adjudged in favor of the defendant. *Held*, error. Every holder of a policy is a member of the corporation, and as such has an interest in it in the character of a stockholder, and it is that interest and that alone which, in our opinion, is exempted from seizure for debt. The money due to the representatives of a deceased member is in no sense an interest "in said institution." It is a debt due from it to them, not as shareholders, but as creditors. Reversed. Opinion by COFER, J.—*Gieger v. McLin.*

FIRE INSURANCE—WAIVER OF FORFEITURE BY DEMANDING PROOFS—FAILURE TO RETURN PREMIUM.—1. A policy of insurance issued to S contained a condition that it should be void in the case of additional insurance without the consent of the company. The property being destroyed by fire the company wrote to their agent that S had made a claim on them, but that it was impossible to determine from the paper which he had sent in what particulars, as it did not even state that S held a policy in the company. The letter continued: "Be good enough to inform Mr. S that if he has any claim to make against this company under or by virtue of a policy of insurance, such claim must be made in strict accordance with the conditions of said policy, to which he is respectfully referred." *Held*, that this did not amount to a waiver by the company of the forfeiture. The act or conduct of the company, in order to operate as a waiver of its right to rely upon the breach as a release from liability, must be such that the insured might reasonably infer therefrom that the company did not mean to insist upon the forfeiture. The insured must have been misled to his prejudice, and if he is so misled by a reasonable and justifiable reliance upon the acts or conduct of the insurer, the waiver or estoppel attaches, whether it was so intended by the insurer or not. The case at bar is unlike the case where, during the continuance of the risk, the insurer is notified, even orally, of other insurance, and yet gives no notice to the insured that the insurer considers the contract of insurance at an end on account of such breach on the part of the insured. The case at bar is also unlike the case where the notice to the insurer comes after the loss, and specific exceptions are taken by the insurer to certain defects in the proof, without notice of intention to rely upon the forfeiture, and when the notice to the insured is accompanied by a request to incur onerous expense, which is in fact incurred, but is not essential to making out proof of claim in the ordinary form. Webster v. Phœnix, Ins. Co. 36 Wis. 71; Gans v. St. Paul, etc., Ins. Co. 43 Wis. 110; Kenton Ins. Co. v. Shea, 6 Bush. 171; Von Bories v. United Life Ins. Co. 8 Bush, 136; Baer v. Phœnix Ins. Co., 4 Bush, 244. 2. Neither does the fact that the company failed to return any portion of what is called the "unearned premium," preclude it from relying on the forfeiture. May on Ins. sec. 567; Flanders on Ins. p. 170. Judgment reversed. Opinion by HINES, J.—*Phœnix Ins. Co. v. Stevenson.*

SUPREME COURT OF MICHIGAN.

October, 1879.

WHEN WRIT OF PROHIBITION WILL BE GRANTED.—The writ of prohibition is a remedy provided by the common law to prevent the encroachment of jurisdiction. It is a proper remedy in cases where the court exceeds the bounds of its jurisdiction, or takes cognizance of matters not arising within its jurisdiction. It can only be interposed in a clear case of excess of jurisdiction, and may lie to a part and not to the whole. It simply goes to the excess of jurisdiction, and the application for the writ may be made by either the plaintiff or the defendant in the case, or if more than one, by either, where the excess of jurisdiction affects him. It can only be resorted to where other remedies are ineffectual to meet the exigencies of the case. It is a preventive rather than a remedial process, and can not, therefore, take the place of a writ of error, or other mode of review. It must also ap-

pear that the person applying for the writ has made application in vain for relief to the court against which the writ is asked. The writ is not granted as a matter of strict right, but rests on a sound judicial discretion, to be granted or not according to the peculiar circumstances of each particular case when presented. 8 Bacon's Ab. Title "Prohibition;" 3 Black. 111; Appo v. People, 20 N. Y. 531; People v. Seward, 7 Wend. 518; Arnold v. Shields, 5 Dana, 21; Washburn v. Phillips, 2 Met. 299; *Ex parte* Hamilton, 51 Ala. 62; Blackburn, *ex parte*, 5 Pike, 22; High. on Inj. §§ 773, 765. Writ denied. Opinion by MARSTON, J. —*Hudson v. Judge of Superior Court.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

8. Where suit is commenced to enforce specific performance of a contract to sell land—suit being brought in the county where the land lies—if the defendant resides out of the county how is service obtained on him? There is only one defendant. H.
Kansas City, Mo.

9. A gives to B $500 to buy land for him. B buys and takes title in his own name. C recovers a judgment against B and levies on the land. D buys at execution sale without notice of A's equitable ownership. Would D at common law, independent of any statutory regulations, get good title? H.

10. Where A and B are husband and wife, without children, A carrries on the business of a blacksmith, and B of a milliner, owning a stock of goods. Can both A and B claim the exemption as the head of a family, and if not which person may? And will the other person be entitled to any homestead exemption from his personal debts? D.
Atchison, Kas.

11. Does the Missouri statute of limitations operate as a bar to a proceeding in equity where neither "the plaintiff, his ancestor, predecessor, grantor or person under whom he claims," has been in the actual possession of the premises within ten years before the commencement of the action? The statute reads "seized or possessed." It is a well settled principle that the seisin follows the legal title, unless it has been interrupted by actual entry and adverse possession. M.

12. Under the laws of Iowa, is a railroad company liable to the garnishment process? Where horses or cattle are being shipped by execution defendant from himself in Iowa to himself in Iowa is it exempt being a common carrier? W. H.

ANSWER.

[3. [10 Cent. L. J. 76.] The practice of making special assessments for local improvements personal liabilities is unconstitutional and void. Under the false plea of benefits had, municipalities are permitted to confiscate the property benefitted, nothing more. St. Louis v. Allen, 53 Mo. 44, and Taylor v. Palmer, 31 Cal. 249, decide these points. C.

CURRENT TOPICS.

A new usury law which went into force in the State of New York on the first of this year is creating much confusion, and an effort looking to the abolishment of usury laws altogether is receiving a considerable support. The arguments *pro* and *con* the limitation of the right to contract for interest on money loaned are familiar, the opinion at the present day in this country at least being in favor of its modification or total abolition. New York is one of the few States where an out and out usury law is in force. The penalties of usury are already abolished in California, Colorado, Florida, Louisiana, Maine, Massachusetts, Nevada, New Mexico, Rhode Island, Utah, Washington and Wyoming. They are abolished, except so far as the interest is concerned, in Alabama, Dakota, District of Columbia, Georgia, Illinois, Iowa, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas and Wisconsin; and except so far as the excess over the legal rate is concerned in Connecticut, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, New Hampshire, Vermont and West Virginia.

"Straw bail," generally confined to justices' courts and the lower criminal courts, came very near invading the precincts of the Supreme Court of the United States at the present term. In *Florida Central Railroad Co. v. Schutte*, a motion to vacate a *supersedeas* on account of fraud in the approval of the bond was made and granted under the following circumstances. A lawyer, an entire stranger to the parties, was employed to procure within forty-eight hours sureties for the appellants to the amount of $100,000. For his services he was to receive six bonds of the appellate corporation of $1,000 each, which bonds at the time were of no marketable value. The sureties were soon procured and made lengthy and voluminous affidavits to the excellence of their financial conditions, and severally signed the bond. But these men of substance were really of this ilk. One, said to be a "very wealthy man," was paid $125 for what he did. Another, the son of a former judge of the Supreme Court of the State of New York, received twelve dollars; another, a colored porter in a lawyer's office, ten dollars; another was paid ten dollars, and another was promised fifty dollars, but actually paid nothing. They were all irresponsible pecuniarily, and known to or suspected by the police of the city of New York as "purchasable sureties." The money to pay them for their fraudulent work was furnished by the president of the appellant company under the form of buying back one of the worthless bonds promised as a reward for what was done. After the bond was executed by the sureties thus obtained, the president of the appellant corporation was called in. He signed officially the name of the corporation and affixed the corporate seal, but did not see or ask to see any of the persons who had become bound with his company. Neither he nor any other person actually interested in the litigation became in any manner personally bound. With such a bond, procured in such a way, the president of the corporation presented himself at the last moment to the justice of the court who heard the cause in the circuit court, at his summer residence in Vermont, and asked that the bond be approved. On its presentation, the justice read and seemed to be impressed "with the fullness and particularity of the justification." He said, "This seems to be a good bond." The reply was "Yes, judge I believe it to be a very good bond." He then asked as to one of the

parties whose name appeared, and the reply was "I am informed that he is the son of a former judge of the Supreme Court of the State of New York of that name," adding of another of the signers "I am advised he is a very wealthy man." After such a mode was a bond for the sum of $100.000 obtained and approved.

In setting aside the *supersedeas* Chief Justice Waite said: "To allow it to stand and to operate as a stay of execution upon an important decree until the case can be reached in its order on our crowded docket would be a reproach upon the administration of justice. * * * This bond is as much false as if it had been forged. The persons who signed it are not in fact what they were represented to be. We have no hesitation in setting aside the approval of the bond. This application is addressed to our judicial discretion, and is based on the alleged ignorance of the officers and agents of the appellant corporation as to the character of the bond they got accepted. They insist in the most positive manner that they were deceived, and that they actually believed the security they offered was ample. The character of the president is vouched for under oath by many persons occupying high positions in public and private life, and they all say 'they do not believe he would knowingly countenance or in any way participate in or suffer an attempt to impose on the Supreme Court of the United States, or any justice thereof, a fraudulent or worthless bond.' But the fact still remains that he did present such a bond, and failed to disclose what he actually knew in reference to its procurement. When appealed to, he, to say the least, repeated the falsehoods that had been told to him, and kept back the fact that the securities had all been 'bought' for trifling sums, and that he had furnished the money to make the purchase, when he knew, or ought to have known, that the price paid was entirely incompatible with any idea of compensation for pecuniary responsibility incurred in good faith. Taking the whole case together, we think it quite as incumbent on us to refuse to accept a new bond as it is to set aside the old one."

RECENT LEGAL LITERATURE.

ABBOTT'S LAW DICTIONARY.

"This work," says Mr. Abbott in his preface, "is strictly a law dictionary, rather than what may be called a dictionary of the law. It deals with the meanings of law terms. * * * Every reader of the reports knows that there are numerous decisions which expound the judicial view of the meaning of some term involved. They are of great value in legal lexicography, but have never been systematically collected or even indexed. The great foundation of this dictionary is in these decisions. The leading American reports, to the extent of at least half, have been patiently examined page by page by the author or assistants working in company with him, for cases of this character. Other reports, including the notable English ones, have been examined as thoroughly as practicable, by aid of all ready guides to their contents. The judicial definitions thus collected have formed the basis of the present work. There have been added a liberal selection of extracts from kindred works, thus making the volumes, in a good degree, a digest of the modern English law dictionaries." When we first read this announcement we could not help feeling a good deal of doubt that the book itself would bear out the wholesale statements of its preface. We could scarcely believe that a digest of the modern English law dictionaries and a collection of the words and phrases which have been judicially construed by the courts, and which are to be found in every volume of the reports from the first one issued to the latest which is upon our table, could be contained in a half dozen volumes, much less two. The subject of the interpretation of words and phrases is larger than any other we know of. We have sometimes seen a volume of reports which did not contain a single case upon the extensive topics of Contracts or Negligence, or even Evidence, but we have never met one that did not have a decision in which the construction of some word or term was in some way in issue, or in which a definition was given by the court. For this reason we did not expect that the work could be all that it was represented to be. We were not, however, regardless of the fact that there was room for one which should present the subject fairly well, and that this was perhaps all that was in the mind of the compiler when he concluded his labors. He has himself confessed that the work was only partially done, for he says that the reports, "to the extent of at least one-half" only had been thoroughly examined. But we have gone far enough into the work to be able to state positively that even this much of the announcement has not been performed. If the leading American reports "to the extent of at least one-half," have really been "patiently examined by the author or his assistants working in company with him," for cases construing words and phrases, all we can say is that the author must number among his assistants a most extraordinary proportion of blind men.

We premise, of course, that in the half of the reports which it is said have been thus treated, the reports of the State of New York in which the author's labors are carried on, are included. But as there are a very great number of volumes of New York reports, we will restrict this to the reports of the Court of Appeals, the highest court in the State. These certainly would be likely to be first consulted by the compiler and his assistants. Now how well has this "page by page" examination been performed? We take the letter "A" as a sample, and the first seventy volumes of the New York Court of Appeals Reports as a test. After a patient examination which we give to the reports we look into the Dictionary. We turn to the word "according"—a word by the way not infrequent in statutes and contracts—but we find no such word in Mr. Abbott's Dictionary. We next look for the phrase "adverse interest," but with the same success. Pursuing our examination we are astonished at finding no mention of "agreement," and nothing said about "alias" or "and." Going carefully through the letter "A" again we find that the Dictionary contains no such titles as "agreeably to law," "annual," "any," "appertaining," "application," "arising," or "avails." So far as we know these words may have been construed in many other cases in other reports. Our examination has not extended any further than the New York reports. But it must be a sufficient proof of the incompleteness of this work, that the words and phrases which we have just given have all been construed by the highest court of New York, and that not one of them is to be found in Mr. Abbott's Dictionary.

Turning again to titles that are in the Dictionary, the omissions appear to be even more numerous. Con-

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Dictionary of terms and phrases used in American or English jurisprudence. By Benj. Vaughan Abbott. In two volumes. Little, Brown & Co. 1879.

fining ourselves again to the same letter and reports as before, we find under "about" no reference to Hawes v. Lawrence, 4 N. Y. 345; under "accident" nothing is said of Mallory v. Travelers Ins. Co., 47 N. Y. 52. Under "account," Spear v. Wardell, 1 N. Y. 144, is not cited; nor under "acknowledged," Baskin v. Baskin, 36 N. Y. 416; nor under "action," Borst v. Corey, 15 N. Y. 505, and Waltermire v. Westover, 14 N. Y. 16; nor under "adjoining," Holmes v. Carley, 31 N. Y. 289, and *re* Ward, 52 N. Y. 395; nor under "adjourn," People v. Martin, 5 N. Y. 22; nor under "adjustment," Mayor v. Hamilton Ins. Co., 39 N. Y. 45; nor under "adoption," People v. Gardner, 45 N. Y. 812; nor under "affidavit" Gawtry v. Doane, 51 N. Y. 84; nor under "alien," Wright v. Saddler, 20 N, Y. 320; nor under "answer," Strong v. Sproul, 53 N. Y. 497, and Kelly v. Downing, 42 N. Y. 71; nor under "assignee," Hight v. Sackett, 34 N. Y. 447. We have gone far enough to show pretty clearly that the work abounds in omissions—that it is not even half done as it purports to be. We shall say nothing about its execution in any other particulars. Its treatment of legal interpretations and its attempts at definitions have been severely criticised in a recent issue of one of our most valued contemporaries. Our examination has been directed only to show how hurriedly the authorities have been skimmed over and how large a proportion of the cases have escaped the notice of the compiler and his assistants. Meagre as our examination has been, it has satisfied us that if we had taken up all the reports and all the letters instead of only the letter "A" and the New York Court of Appeals Reports, and the same ratio of omissions had continued, we could have supplied the author with material for two additional volumes if not more.

NOTES.

——Marcus W. Acheson, of Pittsburg, has been appointed to the judgeship of the United States District Court for the Western District of Pennsylvania, made vacant by the death of Judge Ketcham. Judge Acheson is a native of Pennsylvania having been born in Washington county, in that State, in 1832. He was admitted to the bar of Pittsburg in 1852, of which he has been a leading member for many years.——James Z. George, Chief Justice of the Supreme Court of Mississippi, has been elected to the United States Senate from that State.

——As to the possibility of substituting for the gallows some form of death likely to be less painful, Dr. Henry Nachtel, a distinguished French physicist, now in New York, says that the garrote does not always kill the first time, and could not be made successful except in the hands of a skilful surgeon; that administering chloroform violently is very painful; that prussic acid in the eye does not always produce instantaneous death, and must be administered by a physician; that death by strychnine is sometimes accompanied by terrible convulsions and great pain; and that even electricity is not sure, for a man in England was struck by lightning and stripped of his clothes and many bones were broken, and yet he survived it. "Hanged by the neck until dead" seems likely to remain on the statute books for the present.

——A correspondent of the *Albany Law Journal* has unearthed two points in criminal practice from the old reports. In the trial of the Seven Bishops, after the charge to the jury, the following colloquy took place. The Lord Chief Justice: "Gentlemen of the jury, have you a mind to drink before you go?" Jury: "Yes, my lord, if you please." [*Wine was sent for, for the jury.*] Afterwards the following conversation ensued. Juryman: "My lord, we humbly pray that your lordship would be pleased to let us have the papers that have been given in evidence." Lord Chief Justice: "What is that you would have, sir?" Mr. Solicitor-General. "He desires this, my lord, that you would be pleased to direct that the jury may have the use of such writings and statute books as may be necessary for them to make use of." Lord Chief Justice: "The statute books they shall have." The "treating the jury" it is pointed out would probably vitiate a verdict at this day, but the authorities are not uniform. See Van Buskirk v. Dougherty, 44 Iowa, 62; Kee v. State, 28 Ark. 155; Perry v. Bailey, 12 Kas. 539; Redmond v. Royal Ins. Co., 7 Phila. 167. As regards the second point, in Merritt v. Nary, 10 Allen, 416, a new trial was granted because the judge who presided allowed the jury to have a copy of the general statutes in the jury room while deliberating on their verdict. The ancient authority above mentioned does not appear to have been cited in the argument of the latter case.

——Speaking of Rufus Choate, Mr. Congdon in his Reminiscences has the following: At the end of his senatorial term in 1846 he was glad to go back to his law books and the Boston bar. Opinions may differ respecting his attainments in the science of law; hard-headed old judges like Chief-Justice Shaw perhaps did not think so highly of them as did Mr. Choate's clients, rescued by him from the extreme penalties of the law; but in spite of grave faults of taste, the brilliancy of Mr. Choate, his fervor, passion and verbal opulence put him in the front rank of rhetoricians. Unfortunately he has left little or nothing to justify the great reputation which he attained while living. Posterity can not see his flashing eye, nor mark his dramatic action, nor hear the wonderful intonations which colored and intensified his elecution. His fame will experience something of the actor's ill fortune. But no man was more talked of in his time, which already seems so far away—his habits, his curious learning, his great power of application, his winning way with juries, his classical tastes, and his astonishing handwriting, the most illegible which I ever saw. I recall one occasion when anybody who could have read one of his letters would have been entitled to a handsome gratuity. I was studying law in the office of the Hon. Thomas D. Eliot, the well known member of Congress. There was a case in which both Mr. Choate and Mr. Eliot were engaged; and the former sent down to his junior instructions for making an immediate motion of some importance. Not a man in the office could read the letter, not Mr. Eliot nor Mr. John A Kasson, his partner, nor any one of the students. Here was an unpleasant dilemma! A letter to Mr. Choate asking for explanation was suggested, but time pressed, and there was no certainty that the answer would be any more readable. At last somebody proposed a telegraphic dispatch, with a request for an immediate reply. It was argued conclusively that the electric fluid didn't write splatter-dash hieroglyphics. The plan succeeded perfectly, and the motion was made in time.